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COMMISSION

BEFORE THE FEDERAL ELECTION COMMISSION

**SENSITIVE**  
RECEIVED  
FEDERAL ELECTION  
COMMISSION

2011 MAY 17 P 3:40

2011 MAY 17 PM 3:17

**CELA**

In the Matter of )  
 )  
MUR 6450 )  
WMUR TELEVISION )  
NEW HAMPSHIRE REPUBLICAN )  
PARTY )  
FRIENDS OF FRANK GUINTA )  
PAMELA SMITH, )  
AS TREASURER )  
FRANK GUINTA )

CASE CLOSURE UNDER THE  
ENFORCEMENT  
PRIORITY SYSTEM

**GENERAL COUNSEL'S REPORT**

Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring criteria to allocate its resources and decide which cases to pursue. These criteria include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both with respect to the type of activity and the amount in violation, (2) the apparent impact the alleged violation may have had on the electoral process, (3) the legal complexity of issues raised in the case, (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended ("Act"), and (5) development of the law with respect to certain subject matters. It is the Commission's policy that pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to dismiss certain cases, or in certain cases where there are no facts to support the allegations, to make no reason to believe findings. For the reasons set forth below, this Office recommends that the Commission make no reason to believe findings in MUR 6450.

In this matter, complainant Kevin Rondeau appears to allege that respondents WMUR Television, the New Hampshire Republican Party, Friends of Frank Guinta and Pamela Smith, in her official capacity as treasurer ("the Committee"), and Frank Guinta violated the Act and underlying Commission regulations, by denying him the opportunity to participate in a

1 September 8, 2010 Republican primary debate co-sponsored by WMUR and the *New Hampshire*  
2 *Union Leader*. Though the complaint does not specifically identify how the debate violates the Act,  
3 it appears to allege that WMUR failed to use pre-established, objective criteria to select candidates  
4 for participation pursuant to 11 C.F.R. § 110.13, and further seems to imply that WMUR's staging  
5 of the debate resulted in an unlawful in-kind corporate contribution, in violation of 2 U.S.C.  
6 § 441b(a).

7 In response, WMUR states that it is owned by Hearst Properties, Inc., and asserts that the  
8 media exemption applies in this instance and, therefore, the costs associated with the debate would  
9 be excluded from the definition of contribution or expenditure. See WMUR Response at 3 (citing  
10 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73 and 100.132; *Readers Digest Ass'n, Inc. v. FEC*, 509  
11 F. Supp. 1210, 1214 ( S.D.N.Y. 1981) (holding the media exemption applies where (1) the entity is  
12 not owned or operated by a political party, candidate, or political committee, and (2) the entity is  
13 operating within its "legitimate press function."). WMUR, the Committee, and Congressman  
14 Guinta also assert that section 110.13 permits broadcasters to stage debates that comply with pre-  
15 established, objective criteria to select the candidates who participate.<sup>1</sup> WMUR's criteria require  
16 that candidates: (1) legally qualify to hold office; (2) qualify for the official ballot and to be  
17 registered with the Commission; (3) run an "active campaign" with fundraising, paid staff, networks  
18 of volunteers, and media coverage; and (4) garner at least 10 percent name recognition in an  
19 independent poll. Mr. Rondeau met only the first of the four stated criteria.

20 The Act prohibits "any corporation whatever" from making contributions in connection with  
21 federal elections. 2 U.S.C. § 441b(a). However, 2 U.S.C. § 431(9)(B)(ii) exempts from the  
22 definition of "expenditure," "nonpartisan activity designed to encourage individuals to vote or

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<sup>1</sup> The New Hampshire Republican Party did not file a response.

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1 register to vote," which has been construed to exclude "funds provided to defray costs incurred in  
2 staging candidate debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)"  
3 from the definition of "contribution" and expenditure," respectively. See 11 C.F.R. §§ 100.92 and  
4 100.154. Section 110.13(a)(2), in turn, permits "[b]roadcasters (including a cable television  
5 operator, programmer or producer), *bona fide* newspapers, magazines and other periodical  
6 publications" to stage candidate debates. The regulations leave the structure of the debate to the  
7 discretion of the staging organization, provided that the debate includes at least two candidates, the  
8 organization does not arrange the debates in a manner that promotes or advances one candidate over  
9 another, and the criteria for candidate selection are objective and pre-established, under 11 C.F.R.  
10 §§ 110.13(b)-(c).<sup>2</sup>

11 WMUR is a qualified debate staging entity under section 110.13(a)(2). Further, its objective  
12 criteria for selecting candidates is consistent with a number of different criteria the Commission has  
13 previously found to have been permissible, including the percentage of votes by a candidate  
14 received in a previous election; the level of campaign activity by the candidate; his or her  
15 fundraising ability and/or standing in the polls; and eligibility for ballot access. See MURs 4956,  
16 4962, and 4963 (Gore 2000, *et al.*); MUR 5395 (Dow Jones, *et al.*); and MUR 5650 (University of  
17 Arizona). Accordingly, it appears that the debate sponsored by WMUR complied with 11 C.F.R.  
18 § 110.13 and, therefore, this Office recommends that the Commission find no reason to believe that  
19 WMUR Television, the New Hampshire Republican Party, Friends of Frank Guinta and Pamela  
20 Smith, in her official capacity as treasurer, and Frank Guinta violated 2 U.S.C. § 441b(a).

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<sup>2</sup> In prior Commission matters, we pointed out that measuring the objectivity of the selection criteria does "not require rigid definitions or required percentages." See MURs 4956, 4962, and 4963 (Gore 2000, *et al.*), First General Counsel's Report at 19. "'Objective' does not mean that the candidate selection criteria must be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears they must be free of 'content bias,' and not geared to the 'selection of certain pre-chosen participants.'" *Id.* at 23.

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**RECOMMENDATIONS**

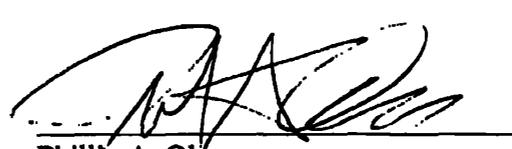
1. Find no reason to believe that the following respondents violated 2 U.S.C. § 441b(a):  
WMUR Television, New Hampshire Republican Party, Friends of Frank Guinta and Pamela Smith, in her official capacity as treasurer, and Frank Guinta; and
2. Close the file and send the appropriate letters.

Christopher Hughey  
Acting General Counsel

5/14/11  
Date

BY:   
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